JENAIN SUBI

v.

PP

HIGH COURT MALAYA, SHAH ALAM
ABDUL RAHMAN SEBLI J
[CRIMINAL APPEALS NO: 42SA-318-09-2011
& 42HA-319-09-2011]
5 DECEMBER 2012

CRIMINAL LAW: *Murder - Intention - Penal Code, s. 304(a) - Appeal against conviction and sentence - Accused a corporal with Royal Malaysian Police - Deceased shot by accused while being chased by police - Whether accused had knowledge that injury likely to cause death - Whether accused had intention to cause death - Whether intention and knowledge are distinct elements to prove offence - Whether appeal allowed*

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The accused ('appellant'), a corporal with the Royal Malaysian Police was charged in the Sessions Court under s. 304(a) of the Penal Code and was sentenced to five years' imprisonment after the court found him guilty of the offence. On the unfortunate day, at about 1.10am, Corporal Azhar ('SP26') and Corporal Mohd Izham ('SP27') were on patrol duties in a mobile patrol vehicle ('MPV') when they were overtaken by a Proton Iswara ('the Iswara') which was driven by the deceased. Despite ordering the Iswara to stop, the deceased drove at high speed and realising that the Iswara was not stopping, SP27 radioed for help and another MPV driven by SP28 with the appellant inside, who was armed with a sub-machine gun, joined the chase. According to SP27, the Iswara was travelling at 130-140 km per hour and upon reaching a roundabout, SP27 fired at the right tyre of the Iswara. reaching. The Iswara began to lose air, but the deceased continued to drive and when the Iswara entered into a road, SP27 heard shots being fired from the MPV where the appellant was in. Despite the shots being fired, the Iswara continued to drive away but only for a short while before it lost control of the vehicle and hit a road kerb. Upon inspection of the Iswara the

A appellant conducted a body search on the deceased who apparently was already dead. In the Sessions Court, the trial judge, *inter alia*, found that the appellant had the intention to cause the deceased's death since the appellant had no justified reasons to fire at the Iswara and convicted him. Hence, the
B appellant appealed against his conviction and sentence. The question that arose for the court's consideration was whether the appellant was actuated by a desire to kill the deceased when he fired at the Iswara.

C **Held (allowing appeal; setting aside conviction and sentence):**

(1) One of the fundamental principles of criminal law, with the exception of strict liability offences is that an act does not constitute guilt unless it is done with a guilty mind. Intention is a key element in a prosecution under s. 304(a) of the Penal
D Code. To sustain a conviction, the prosecution must prove beyond any reasonable doubt that the appellant's intention was to kill the deceased. This element must be established at the close of the prosecution case. (para 12)

E **(2)** Section 304 of the Penal Code creates no offence but provides the punishment for culpable homicide not amounting to murder and draws a distinction in the penalty to be inflicted where an intention to kill is present and where the offender knows that his act is likely to cause death. Whether the
F intention is there or not is a question of fact and is a matter of inference (*Liew Kaling & Ors v. PP*; refd). (paras 13 & 14)

(3) There was a serious misdirection by the learned trial judge. The question was not whether there was justification to fire
G at the Iswara but whether in firing at the said car, the appellant's intention was to cause death. The element of the offence under s. 304(a) of the Penal Code is intention to cause death and not knowledge of causing bodily injury likely to cause death, which is an element under para. (b). Intention
H and knowledge are distinct elements requiring different kinds of proof. (paras 18 & 19)

(4) In determining whether the appellant had the necessary criminal intention, two questions must be asked, ie, (i) did the
I appellant intend to shoot at the deceased and if the answer is yes, the next question is (ii) by shooting at the deceased, was his intention to cause death. If the answer to either question

is in the negative, the appellant must be acquitted of the charge. In finding the answers to these questions, it is of utmost importance for the court to be clear on what the appellant's intention was when he opened fire. (para 20)

(5) The fact that only one out of 30 bullets hit the upper part of the car while the other 29 hit its lower back and underside showed that the single bullet that hit the back of the deceased's head was unintended. This may further be explained by the expert evidence of SP24, who was the head of the Firearms Division of the Chemistry Department that a bullet can ricochet on hard surface such as a car spoiler. Thus, the possibility that it was an accident or misfortune within the meaning of s. 80 of the Penal Code could not be ruled out. Further, the shots fired by the appellant were discharged in just two bursts of fire. In any case, it was not the number of shots that matters but the intention behind that shots that the court should be concerned with. (paras 21 & 23)

(6) Even if the court were to consider the element of knowledge, the facts did not support an inference that the appellant knew his act was likely to cause death within the meaning of s. 304(b) of the Penal Code. That inference would only be valid if the appellant had aimed his shots at the driver's side of the car and not its lower back and underside. (para 26)

(7) There is no hard and fast rule as to when the police can open fire at fleeing suspected criminals. It must depend on the facts and circumstances of each case but clearly the situation that the police were faced with in the early hours on the material day warranted the discharge of firearms by both SP27 and the appellant. The police would not have been justified to open fire at the Iswara if the deceased had not conducted himself like a dangerous criminal who was intending to evade arrest. The fact that he was not a criminal is of no consequence if otherwise by his conduct, he had led the police into believing that he was one. (paras 29 & 31)

(8) The appellant's intention when he opened fire was to shoot at the Iswara and not at the deceased and his sole intention was to immobilise the car. The totality of the evidence could not support any suggestion that the appellant's intention was

A to kill the deceased. Further, no *prima facie* case had been established and the defence should not have been called. Hence, there had been an improper and insufficient judicial appreciation of the evidence by the learned trial judge (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor*; refd). (para 32)

B

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***

County of Sacramento, et al., Petitioners v. Teri Lewis and Thomas Lewis, personal representative of the Estate of Philip Lewis, deceased 523 US 833 [1988] SC ***(refd)***

C *Lee Ing Chin & Ors v. Gan Yook Chin & Anor [2003] 2 CLJ 19 CA* ***(refd)***

Liew Kaling & Ors v. PP [1960] 1 LNS 60 HC ***(refd)***

Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***

Marshall v. Osmond and Another [1982] 3 WLR 120 ***(refd)***

Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***

D *Tony Beliang v. PP [2003] 1 CLJ 482 HC* ***(not foll)***

Legislation referred to:

Penal Code, ss. 80, 304

Other source(s) referred to:

E Ratanlal & Dhirajlal's, *Law of Crimes*, 25th edn, p 1550

For the appellant - M Athimulan; M/s Athimulan & Co
Salim Bashir (Halim Ashgar with him); M/s Salim Bashir Ruswiza & Co

For the prosecution - Idham Abdul Ghani (Dusuki Mokhtar & Siti Rohaida
F *Che Hamid with him); DPP*

Reported by Kumitha Abd Majid

G

JUDGMENT

Abdul Rahman Sebli J:

The Charge

H **[1]** The appellant, a Corporal with the Royal Malaysian Police was charged in the Sessions Court at Shah Alam with culpable homicide not amounting to murder under s. 304(a) of the Penal Code and the charge against him is as follows:

I

> Bahawa kamu pada 26.4.2010 jam antara 1.10 pagi dan 2.00 pagi di Jalan Tarian 11/2, Seksyen 11, dalam Bandaraya Shah Alam didalam Negeri Selangor Darul Ehsan telah melakukan perbuatan yang menyebabkan kematian Aminulrasyid bin Amzah (No. KP 950815-10-6869) dengan niat hendak menyebabkan kematian dan

dengan itu kamu telah melakukan kesalahan mematikan orang dengan salah yang tidak terjumlah kepada kesalahan membunuh dan boleh dihukum dibawah seksyen 304(a) Kanun Keseksaan.

[2] He was found guilty after a full trial and sentenced to five years imprisonment. This is his appeal against conviction and sentence. The prosecution is cross appealing against inadequacy of sentence. The factual matrix of the case raises an important question as to the circumstances under which the police can open fire while pursuing suspected criminals. The charge against the appellant is that while on duty he deliberately fired at the deceased with intention to kill him. It is a grave allegation not only against the appellant but against the Royal Malaysian Police as a whole.

The Facts

[3] The facts are as follows. At about 1.10am on 26 April 2010 Corporal Azhar bin Hashim ("SP26") and Constable Mohd Izham bin Mahayadin ("SP27") were on patrol duties at Section 2 Shah Alam in a Mobile Patrol Vehicle ("MPV") code named SEL 589 when they were overtaken by a white Proton Iswara Aeroback registration plate number BET5023 ("the Iswara"). The car came from the direction of Persiaran Dato' Menteri and speeding towards PKNS. It was travelling at around 100 km per hour. SP26 suspected that it had beaten the red traffic light in front of PKNS and looked suspicious. On seeing this, SP26 who was at the wheel activated the siren and beacon light of the MPV and gave chase. Through the MPV loud-hailer SP27 ordered the car to slow down and to stop at the roadside. He gave the order two to three times. According to him the loud-hailer produced a loud sound. Instead of stopping the Iswara drove even faster. SEL 589 then chased the car right up to the Permai roundabout and then to Persiaran Masjid. Here, SEL 589 tried to overtake the Iswara in an attempt to force it to stop but failed as the Iswara blocked its way by swerving to the right. The Iswara was being driven at a speed of 120-130 km per hour. This happened about three times and almost caused SEL 589 to crash into the road divider. The chase then moved to the Bulatan Setia roundabout, still at high speed.

[4] Realising that they could not stop the car by themselves SP27 radioed for help requesting any MPV in the area to stop the Iswara. In the meantime they continued to give chase. At Section 5, SEL 589 tried once again to overtake the Iswara but again it

was blocked. When they reached the junction in front of Concorde Hotel the traffic light was red against the Iswara but it sped off and entered Persiaran Kayangan, travelling at a speed of 140km per hour. It almost knocked down a motorcyclist who was crossing the junction. As they were passing the traffic light junction, SP27 realised that another MPV had joined in the chase. The siren and beacon light of the MPV were also activated. It was SEL 614 driven by Constable Mohamad Hafizd bin Mohd Yusof ("SP28") with the appellant inside as his patrol partner. The appellant was armed with a sub-machine gun.

[5] When the two MPVs reached the Section 9 Shell station, it was SEL 614's turn to try to overtake the Iswara but it too was blocked, this time by a swerve to the left. At this point SEL 589 and SEL 614 were travelling side by side behind the Iswara. The traffic lights at Persiaran Kayangan were also red at the time but again the Iswara did not stop and continued to speed away. According to SP27, the Iswara was travelling at 130-140 km per hour while SEL 589 was travelling at 120-130 km per hour. When they reached the Persiaran Kayangan roundabout, SEL 589 caught up with the Iswara as it had slowed down to 60-70 km per hour upon entering the roundabout. SP27 then fired at the right rear tyre of the Iswara. His intention was to slow down the car. This is confirmed by SP28 who testified that the crew of SEL 589 opened fire at the Iswara at the Kayangan roundabout. This is further supported by the evidence of Shaari bin Desa ("SP24"), Head of the Firearms Division of the Chemistry Department who testified that two bullets entered the right rear tyre of the Iswara. As a result of the shots the right rear tyre of the car began to lose air. However it continued to drive on and proceeded to enter Jalan Wau in front of the Caltex and Esso petrol stations at a speed of 80-90 km per hour. Then it turned left into Jalan Tarian 11/2 at 60-70 km per hour. It was at this point that SP27 heard shots being fired from behind. When he turned his head he saw SEL 614 behind and to the left of SEL 589. According to SP27 the first shots were a burst of fire without interval which he described as "truuuup" followed one or two seconds later by another burst of fire. SP27 added that by this time the rear of the Iswara was wobbly, which he reckoned was due to the flat rear tyre but it could still drive on. SP27 also noticed that the petrol tank was leaking.

[6] SP27 further testified that after the shots were fired at Jalan Tarian 11/2, the Iswara continued to drive away but only for a short while. It soon lost control and hit a road kerb before

crashing into the concrete wall of a house. SP27 got out of SEL 589 and slowly moved towards the Iswara with his gun pointing halfway downwards. As he was approaching the Iswara he saw a male person getting up from behind the car and trying to run away but SP26 managed to catch the male person. As SP26 tried to handcuff the male person he put up a struggle and both SP26 and the male person fell onto the grass. The male person managed to break free and dashed off into the darkness. SP26 and SP27 gave chase but lost him at the end of Jalan Gamelan. They then returned to the Iswara where they saw the appellant conducting a body search on the driver of the Iswara who apparently was already dead. Then they saw the appellant calling for an ambulance using his hand phone.

[7] According to SP27, from the start of the chase until the Iswara crashed at Jalan Tarian 11/2, the Iswara beat six red traffic lights. He further testified that during the same period the Iswara blocked their attempts to overtake about 10 times, forcing them to apply the emergency brakes. He said they were lucky not to have been hit by the Iswara as the car was driven very aggressively. This is confirmed by SP26 who testified that the Iswara was driven recklessly and in a zig-zag manner during the high speed chase. He added that he gave many orders through the loud-hailer for the Iswara to stop but was ignored. The testimonies of SP26 and SP27 were confirmed in material particulars by the testimony of SP28.

Reason For The Escapade

[8] The testimony of Muhammad Azamuddin bin Omar ("SP29"), 15 years old at the time of the incident provides an insight as to why the deceased acted the way he did on that fateful early hours of 26 April 2010. SP29 was a close friend of the deceased, also aged 15 years. His testimony is that on the night of 25 April 2010 the deceased was loafing (*lepak*) at the D&Night restaurant, Section 11 Shah Alam. While there he phoned SP29 asking him to come over and join him at the restaurant. SP29 agreed and proceeded to the restaurant on foot together with another friend by the name of Shazali @ Abong. The time was around 12 midnight. When they reached the restaurant the deceased was there alone. SP29 then called his other friend Basir, asking him to join them. Basir obliged and came with another friend on a motorbike.

[9] While they were enjoying themselves at the D&Night restaurant Basir informed them that he had to go to Section 7 Shah Alam as his friend's motorbike had punctured a tyre and he needed help. So they all left D&Night restaurant and proceeded to Section 7. The deceased and SP29 went in the Iswara driven by the deceased. He had no driving licence and the car belonged to his sister. When they reached Section 7 they took a shortcut through a row of shop houses. As they were turning into a corner at Ali Corner restaurant, the Iswara grazed a Toyota Celica parked outside the restaurant. There were many customers in the restaurant at that time. SP29 told the deceased to try to discuss the matter with the Celica owner and not to run away but the deceased said he was scared and wanted to return the car to his sister. So he drove off. As they were exiting Section 7, they were chased by a group of around five people on three - five motorbikes. The deceased became even more scared and sped towards Section 9 and then to the Kayangan roundabout.

[10] According to SP29 they had almost reached the deceased's house when they were hemmed from the side by one of the motorbikes. The motorbike however lost control and crashed. There was a loud crashing sound according to SP29. This motorcyclist was in fact R Lokman Hakim bin Daly ("SP32"), a friend of the Toyota Celica owner. The reason why he crashed was because the Iswara blocked his way as he was trying to overtake the car to see who the driver was. The deceased then sped towards the PKNS complex, leaving the motorcyclist far behind. However the motorcyclist got up and continued to give chase. In his bid to escape from the motorcyclist the deceased beat the red traffic light at the PKNS junction and overtook a police patrol car. He almost collided with another car that happened to drive past the junction.

[11] The police gave chase and ordered the Iswara to stop but it sped off towards Kayangan roundabout, then turned left towards Section 11 in front of the Caltex and Esso petrol stations before entering Jalan Tarian 11/2. It was here that they were fired at. SP29 estimated around 15 shots being fired. According to SP29 after the shots were fired the deceased fell on his lap. At first he thought the deceased was joking but realised that it was for real after touching blood on the deceased's head. The car then crashed into the concrete wall of a house before coming to a complete stop. SP29 confirmed SP26's and SP27's evidence that they tried to detain him but he managed to run away. In cross-

examination SP29 agreed that the deceased was driving recklessly without heeding their own safety and the safety of other road users. He said if it were him he would stop after the police ordered them to do so. This claim however must be taken with a pinch of salt as he scuffled with the police and fled from the scene after the Iswara had crashed at Jalan Tarian 11/2.

Whether There Was Intention To Cause Death

[12] One of the fundamental principles of criminal law, with the exception of strict liability offences is that an act does not constitute guilt unless done with a guilty mind, *actus non facit reum nisi mens sit rea*. Intention is a key element in a prosecution under s. 304(a) of the Penal Code. It is the same element required to prove murder. To sustain a conviction the prosecution must prove beyond any reasonable doubt that the appellant's intention was to kill the deceased. This element must be established at the close of the prosecution case. The question for determination is whether the appellant was actuated by a desire to kill the deceased when he fired at the Iswara.

[13] Section 304 of the Penal Code creates no offence but provides the punishment for culpable homicide not amounting to murder, and draws a distinction in the penalty to be inflicted where an intention to kill is present and where the offender knows that his act is likely to cause death. In dealing with s. 304 of the Indian Penal Code the learned authors of *Ratanlal & Dhirajlal's Law of Crimes* 25th edn. have this to say at p. 1550:

> The most important consideration upon a trial for this offence is the intention or knowledge with which the act which caused the death, was done. The intention to cause death or the knowledge that death will probably be caused, is essential and is that to which the law principally looks. And it is of the utmost importance that those who may be entrusted with judicial powers should clearly understand that no conviction ought to take place, unless such intention or knowledge can from the evidence be concluded to have really existed.

[14] Whether the intention is there or not is a question of fact and is a matter of inference. It can rarely be proved by direct evidence. As a wise man once said even the devil himself does not know what goes on inside a person's mind. But whatever may the devil wish to advocate a man must be judged by his outward acts and omissions. The rule on the drawing of inferences is clear. In

Liew Kaling & Ors v. PP [1960] 1 LNS 60 the Malayan Court of Appeal held that before an inference can be considered to be a valid one it must comply with two conditions, namely:

(a) it must account for all the known facts; and

(b) it must be the only reasonable inference which will account for all these facts.

[15] In *Tai Chai Keh v. PP* [1948] 1 LNS 122, Spencer Wilkinson J held that where there is more than one inference that can reasonably be drawn from a set of facts, the inference most favourable to the accused must be adopted. This principle has been reaffirmed by the Federal Court in *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[16] The learned trial judge dealt with the question of intention in the following way:

> Niat boleh ditentukan melalui "internal and invisible acts of the mind and they can only be ascertained from external and visible acts". Dalam kes yang dibicarakan mengikut keterangan saksi-saksi tembakan 21 das yang dilepaskan oleh OKT adalah tembakan yang tidak wajar bagi seorang anggota polis lakukan. Ini dengan mengambilkira bahawa persekitaran pada waktu itu tidak memerlukan OKT untuk melepaskan tembakan melulu dan bertubi-tubi lebih-lebih lagi secara auto disebabkan pada masa itu kereta BET 5023 tidak agresif lagi. Tiadanya himpitan MPV berlaku, tiada tembakan atau ancaman yang dikeluarkan oleh kereta tersebut semasa di Jalan Tarian 11/2. Mahkamah berpendapat bahawa OKT sedar bahawa dengan tembakan 21 das tersebut bukan sahaja akan mencederakan tetapi tembakan secara automatik itu akan juga menyebabkan kematian kepada sesiapa yang ada didalam kereta BET 5023 tersebut.

[17] She then outlined the following factors as proof of the appellant's intention to cause death:

(a) SP27 only opened fire at the Kayangan roundabout and the shots were aimed at the right rear tyre of the Iswara;

(b) the Iswara was very unstable and wobbly when it entered Jalan Tarian 11/2, no longer aggressive and not being driven recklessly;

(c) the Iswara was on the verge of skidding out of control on entering Jalan Tarian 11/2;

(d) the petrol tank was leaking and the right rear tyre was flat when it entered Jalan Tarian 11/2; A

(e) the Iswara was only driven at 60-70 km per hour;

(f) there was no threat from the Iswara either to the appellant or to SEL 614; B

(g) while entering Jalan Wau 11/1 and Jalan Tarian 11/2 the Iswara was no longer posing any danger to other road users;

(h) Jalan Tarian 11/2 was a housing area and therefore it was impossible for the deceased to escape, coupled with the fact that it had become unstable due to the flat right rear tyre and leaking petrol tank. C

(i) there was no provocation from the Iswara after entering Jalan Tarian 11/2; D

(j) throughout the high speed chase neither the driver nor the passenger of the Iswara did anything dangerous towards SEL 589 such as opening fire at the MPVs or threatening them with weapons; E

(k) no evidence that the deceased and SP29 were criminals except for beating the traffic lights and driving recklessly;

(l) as a reasonable policeman the appellant should have known that by opening fire not only could he cause injury but also death; F

(m) the appellant's life was not in danger;

[18] It is patently clear that the reason why the learned trial judge found intention to be present was because the appellant had no justification to fire at the Iswara. With due respect to the learned trial judge the question is not whether there was justification to fire at the Iswara. The question is whether, in firing at the Iswara the appellant's intention was to cause death. H Judging from the passage quoted above the learned judge appears to have confused intention with knowledge. She appeared to have fused the two elements together. She repeated this later in her grounds of judgment when she said: G

> Mahkamah juga berpendapat bahawa dengan kesan tembakan yang ada pada kereta BET 5023 adalah jelas menunjukkan OKT menembak dan melakukan perbuatan tersebut dengan mengetahui bahawa ianya boleh menyebabkan kematian. I

[19] This is a serious misdirection. The element of the offence under para. (a) of s. 304 of the Penal Code is intention to cause death, not knowledge of causing bodily injury likely to cause death, which is an element under para. (b). Intention and knowledge are distinct elements requiring different kinds proof. The public prosecutor in his wisdom decided to charge the appellant under para. (a) instead of para. (b). The court must therefore direct its mind to the question of intention and not to knowledge or any other element extraneous to the offence charged. It is grossly unfair to pass judgment on any matter affecting the appellant in respect of which he was never charged with.

[20] In determining whether the appellant had the necessary criminal intent two questions must be asked, namely: (i) did the appellant intend to shoot at the deceased? If the answer is yes, the next question is: (ii) by shooting at the deceased was his intention to cause death? If the answer to either question is in the negative the appellant must be acquitted of the charge. In finding the answers to these questions it is of the utmost importance for the court to be absolutely clear on what the appellant's intention was when he opened fire. Was his intention to shoot at the deceased, or was his intention to shoot at the car, or was his intention to shoot both the car and the deceased? In this regard the testimony of SP28 is crucial. His evidence is that when the appellant fired at the Iswara he was aiming his sub-machine gun at the lower back of the moving car. This is evidence coming from the prosecution itself and is corroborated by SP24, not that SP28's evidence requires corroboration. It is therefore the prosecution's own case that the appellant fired at the lower back of the Iswara and not at the driver.

[21] SP24's testimony is that except for one bullet that hit the rear windscreen of the Iswara and which went through to the headrest of the driver's seat, the other 29 bullets hit the back and underside of the car, including the exhaust pipe, the petrol tank, the rear plate number, the left rear tyre and the left rear mud flap. This independent corroborative evidence shows beyond any doubt that when the appellant fired at the Iswara his intention was to immobilize the car and not to shoot at anyone inside the car. The fact that only one out of the 30 bullets hit the upper part of the car while the other 29 hit its lower back and underside shows that the single bullet that hit the back of the deceased's head was unintended. This may further be explained by SP24's expert evidence that a bullet can ricochet on hard surface such as a car

spoiler. Thus the possibility that it was an accident or misfortune within the meaning of s. 80 of the Penal Code cannot be ruled out. Section 80 provides as follows:

> 80. Nothing is an offence which is done by accident or misfortune, and without any criminal intention or knowledge, in the doing of a lawful act in a lawful manner, by lawful means, and with proper care and caution.

[22] Sarjan Mohd Sani bin Hassan ("SP10"), Head of the Firearms Division IPD Selangor testified that the appellant is a skillful shooter. If that is so and if indeed the appellant had intended to kill the deceased he would have fired directly at him and the deceased's body would have been riddled with bullet, not just one bullet. Yet it was the lower back and underside of the car that was riddled with bullet. Or the appellant could simply wait for the Iswara to skid off the road as SP27 said it inevitably would and then open fire at the deceased. Yet the evidence of SP27 shows that the appellant did not fire any shot after the Iswara had crashed. Instead he called for an ambulance. The learned judge however considered the appellant's shooting skill as evidence unfavourable to him when she said:

> Mahkamah juga mengambilkira keterangan bahawa OKT adalah seorang penembak yang mahir beliau seharusnya sedar tembakan secara auto boleh menyebabkan kematian tidak kira bahagian mana beliau target. Beliau juga boleh "Forsee" bahawa dalam keadaan kereta bergerak kesasaran tembakan boleh berlaku.

[23] The summation is untenable. In the first place there is no basis for the learned judge to conclude that irrespective of where the appellant targeted his shots, death could be the result of his act. While she was right in saying that there was a possibility the bullets could stray from the intended target, she was wrong in treating this as evidence of intention or knowledge on the part of the appellant. According to Inspector Muhamad Radhi bin Abdul Hamid ("SP16") of the Firearms Unit IPD Selangor, when the gun is set on auto mode there will be a continuous discharge of fire when the trigger is pulled. It will only stop firing when the trigger is released. This means the appellant did not pull the trigger 21 times when firing the 21 shots. This is consistent with SP27's evidence that he heard a "truuuup" sound when the first round of shots were fired, followed one or two seconds later by another burst of fire. The significance of this evidence is that although 21 bullets were discharged from the appellant's sub-machine gun he only pulled the trigger twice, with a gap of only one or two

A seconds in between. Clearly this is evidence favourable to the appellant. The learned trial judge however regarded the evidence as damning to the appellant when she said in a negative tone that the 21 shots that the appellant fired were fired repeatedly (*bertubi-tubi*). This is a misconception because the 21 shots that the B appellant fired were discharged in just two bursts of fire, as testified by SP27. To say that the appellant fired the 21 shots repeatedly is to imply that he pulled the trigger more than once in rapid succession, which he did not. In any case it is not the number of shots that matters. It is the intention behind the shots C that the court should be concerned with.

[24] The appellant's action must be understood in the context of what happened prior to the shooting. He came on the scene purely in answer to a call for assistance by SEL 589 to stop the D Iswara. The deceased had engaged not one but two police MPVs in a high speed chase, driving at a speed exceeding 130 km per hour and was showing no sign of stopping even after being ordered to do so several times through the loud-hailer and even after the right rear tyre of the car was shot by SP27 at the E Kayangan roundabout. In such situation the pursuing policemen including the appellant could not reasonably be expected to think that the driver was an innocent 15 year old boy out to have some kind of fun with the police. On the contrary they had every reason to suspect that there were criminals inside the car who had just F committed a robbery. It is a strange coincidence that a long *parang* without scabbard was found under the front passenger seat of the Iswara. It must also be remembered that it was past midnight when the incident happened, a time when 15 year olds should be at home.

G **[25]** While it is true that the Iswara was no longer speeding at Jalan Tarian 11/2 and that the car was wobbly after the right rear tyre was shot by SP27 at the Kayangan roundabout, there can be no doubt that the deceased was bent on making his escape. H Despite the flat rear tyre he was still driving at 60-70 km per hour as he entered the junction of Jalan Tarian 11/2, the same speed that he was driving at the Kayangan roundabout where the car was shot at by SP27. There was no change of attitude. This speed of 60-70 km per hour when turning into a sharp corner I cannot be considered slow, especially when the car was showing no sign of stopping and continuing to be defiant. The unstable

condition of the Iswara that SP27 saw could largely be due to the way it was driven by the deceased, made worse by the fact that it was making a sharp turn to the left. Even SP29 agreed in cross-examination that the deceased was still driving recklessly at the time they entered Jalan Tarian 11/2.

[26] Even if it is true that the Iswara was very unstable when it entered Jalan Tarian 11/2, there is no evidence that the appellant knew that the condition was due to a flat tyre and that it was about to skid off the road, as claimed by SP27. It must be borne in mind that SEL 614 was one car behind SEL 589 and to its left and the Iswara was turning left into Jalan Tarian 11/2 at 60-70 km per hour. Surely from that left position the appellant would not have clear sight of the right rear tyre of the Iswara. More importantly, according to SP27 visibility at Jalan Tarian 11/2 at that time was poor as the area was dimly lit. He said there were not many street lights and some were not functioning. It is therefore wrong for the learned trial judge to conclude that the Iswara was no longer driven in an aggressive manner and that the appellant must have intended to kill the deceased when he opened fire. The conclusion does not stand up to reason as there are other reasonable inferences favourable to the appellant that could be drawn from his act. Even if the court were to consider the element of knowledge, the facts do not support an inference that the appellant knew his act was likely to cause death within the meaning of para. (b) of s. 304. That inference will only be valid if the appellant had aimed his shots at the driver's side of the car and not its lower back and underside.

[27] The learned judge held the view that the appellant would only be justified in firing at the Iswara if his life was in real danger. This is reflected in the following two passages in her judgment:

> Walaupun anggota polis dibenarkan menggunakan senjata tetapi ianya hendaklah digunakan dalam keadaan nyawanya benar-benar berada dalam keadaan bahaya dan terancam, bukan dibuat secara membabi buta tanpa amaran terlebih dahulu.

> Dari keterangan SP27 menunjukkan bahawa tindakan OKT melepaskan tembakan sewaktu memasuki Jalan Tarian 11/2 tidak ada kewajaran dan sebagai seorang anggota polis tembakan cuma dibenarkan dalam keadaan nyawa sangat terancam atau sebagai "self-defence".

[28] This is erroneous as it was never the defence case that the appellant was acting in self defence when he fired at the Iswara. The defence case simply is that the appellant's intention was to immobilise the car, not that his life was in danger. The learned judge's reliance on *Tony Beliang v. PP* [2003] 1 CLJ 482 is therefore misplaced. The learned judge had imposed unwarranted restrictions on the police before they could fire at fleeing suspected criminals. In *County of Sacramento, et al, Petitioners v. Teri Lewis and Thomas Lewis, personal representative of the Estate of Philip Lewis, deceased* 523 US 833 [1988] the Supreme Court of the United States was dealing with the issue of violation of the Fourteenth Amendment. Souther J in delivering the judgment of the court held as follows:

> The issue in this case is whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender. We answer no, and hold that in such circumstances only a purpose to cause harm unrelated to the legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience, necessary for a due process violation.

[29] There is no hard and fast rule as to when the police can open fire at fleeing suspected criminals. It must depend on the facts and circumstances of each case but clearly the situation that the police were faced with in the early hours of 26 April 2010 warranted the discharge of firearms by both SP27 and the appellant. Even if the appellant had been reckless in firing at the Iswara as the learned trial judge seems to be suggesting, which in my view he was not, it was clearly not unrelated to the legitimate object of immobilising it. Therefore the appellant was not acting beyond the scope of his duty when he opened fire at the Iswara.

[30] In *Marshall v. Osmond and Another* [1982] 3 WLR 120 the plaintiff, one of a group of young men, was travelling as a passenger in a car in the early hours of the morning. He knew that the car had been taken and driven away without the consent of its owner. An unmarked police vehicle followed it and when it stopped a uniformed police officer got out and walked towards the car to speak to its occupants. As he did so, the car reversed and set off at a speed and the police vehicle began to chase it. After travelling only 300 to 400 yards the car pulled up sharply and the occupants began to get out in a hurry and disperse into the

nearby bushes. As the plaintiff was leaving the car, the police vehicle drew up alongside and the plaintiff was injured. He claimed damages against the officer driving the vehicle and the Chief Constable on the ground that his injuries were caused by the negligent driving of the police officer. On the question of liability Milmo J held:

> In my judgment a police officer driving a motor car in hot pursuit of a person or persons whom he rightly suspects of having committed an arrestable offence does not owe that person the same duty of care which he owes to a lawful and innocent user of the highway going about his lawful occasions. He must not deliberately injure such a person unless it is reasonably necessary to do so in order to arrest him, and his actions must not be judged by standards which would be applicable if the situation were such that the officer could have taken to discharge his duty successfully.

[31] Although the case involves a personal injury claim founded on negligence the decision is relevant to show the kind of circumstances under which the police can and cannot be held accountable for causing death or injury while carrying out their lawful duties. In the instant case the police would not have been justified to open fire at the Iswara if the deceased had not conducted himself like a dangerous criminal intent on evading arrest. The fact that he was not a criminal is of no consequence if otherwise by his conduct he had led the police into believing that he was one.

Conclusion

[32] Having regard to the totality of the evidence and the probabilities of the case it is clear that the appellant's intention when he opened fire was to shoot at the Iswara and not at the deceased and that his sole intention was to immobilise the car. The totality of the evidence does not and cannot support any suggestion that the appellant's intention was to kill the deceased. There had been improper and insufficient judicial appreciation of the evidence by the learned trial judge: *Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19. The finding of guilt is therefore unsustainable and liable to be set aside. No *prima facie* case had in fact been established against the appellant and his defence should not have been called. The evidence falls way below the standard required to establish a *prima facie* case as laid

down by the Federal Court in *Balachandran v. PP* [2005] 1 CLJ 85. I would go so far as to say that the evidence led by the prosecution proves the appellant's innocence rather than his guilt. The loss of life is unfortunate but the police must not be blamed for the deceased's death. If only he had stopped immediately when ordered to do so he would probably still be alive today and the appellant would be spared the ignominy of being charged with committing a hideous crime when all he did was to answer his call of duty. In the circumstances the conviction is set aside and I order that the appellant be acquitted of the offence charged.